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Jonathan Miller  
Secretary

December 22, 2010

**No. 10-30**

John Broxon  
Marketing Manager  
MPH Industries, Inc.  
316 East Ninth Street  
Owensboro, KY 42303

RE: Determination of Protest: RFB 758 1100000219 (Traffic Enforcement Radar Units).

Dear Mr. Broxon:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the terms of solicitation RFB 758 1100000219 for Traffic Enforcement Radar Units (the "RFB"). In its protest, MPH Industries, Inc. ("MPH") contends that the RFP terms are unduly restrictive. For the reasons stated herein, this protest is sustained.

### **FACTUAL BACKGROUND**

The Finance Cabinet, Office of Procurement Services ("OPS"), issued the RFP on September 14, 2010, on behalf of the Kentucky State Police ("KSP"). The RFB sought bids for radar units and specified the radar device with ninety-two (92) specific specifications. The RFB did contain a "or equal" provision. RFB, Section 2.11.

On September 21, 2010, MPH filed a written protest to the contents of the solicitation. In specific, MPH contends that the RFB specifications are unduly restrictive and, in fact, can only be met by one specific manufacturer which has patented certain features which are specified in the RFB. On November 22, 2010, OPS responded to the protest.

## **DETERMINATION**

After a review of the record consisting of (1) the solicitation, (2) the protest, (3) the protest response, and (4) the applicable statutes and regulations, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. MPH was a prospective bidder to the RFB so it has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the solicitation was issued on September 14, 2010. MPH filed its protest on September 21, 2010. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

This procurement was conducted as "competitive sealed bidding" under KRS 45A.080. The statutory scheme imposes certain requirements for RFBs. The solicitation shall state that awards shall be made on the basis of best value. KRS 45A.080(2). "Best value" means a procurement in which the decision is based on the primary objective of meeting the specific business requirements and best interests of the Commonwealth. These decisions shall be based on objective and quantifiable criteria that shall include price and that have been communicated to the offerors as set forth in the invitation for bids. KRS 45A.070(3).

While the use of best value criteria is mandatory, the agency has discretion concerning the fashioning of the criteria. The standard is the best value criteria must "meet [ . . . ] the specific business requirements and best interests of the Commonwealth." The agency's determination about its business requirements will be reviewed under an arbitrary, capricious, or contrary to law standard. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Other grounds for protesting a solicitation include a restricted advertising period, the improper use of a sole source contract, the improper use of a "brand name" specification without an "or equal" provision, or of any other ground which illegally restricts competition. KRS 45A.010(d)-(g); FAP 111-38-00(5)-(6). In specific, FAP 111-38-00(5)-(6) provides:

**5. Restrictive Descriptions:** Purchase descriptions shall not be written so as to specify a product or a particular feature of a product specific to one manufacturer or vendor, unless it is determined that the particular feature is essential to the Commonwealth's requirements and other vendors lack the essential feature necessary to meet the Commonwealth's need. An agency shall provide documentation to support the determination.

- a. Brand Name or Approved Equal:** The identification of a requirement by the use of a brand name followed by the words "or approved equal" shall be used only if an adequate specification or more detailed description cannot feasibly be provided. Citing of a brand



name in no way indicates a preference.

- b. **Essential Products:** The words "or approved equal" shall not be added if it has been determined that only a particular product meets the essential requirements of the Commonwealth.
  - c. **Brand Name Products:** The term "brand name product" means a commercial product described by a brand name and make or model number or appropriate description by which such product is offered for sale by the particular manufacturer, producer or distributor. If feasible, all known acceptable brand name products shall be referenced.
6. **Use of the "Or Approved Equal":** Brand name or approved equal purchase descriptions shall describe those most important characteristics of the referenced products essential to the needs of the agency. Purchase descriptions shall contain the following information to the extent available, and include other information necessary to describe the item required:
- a. complete common generic identification;
  - b. the most current applicable model, make or catalog number for each brand name product;
  - c. name of the manufacturer, producer or distributor of each brand name product; and
  - d. an adequate commercial catalog description or extracts therefrom, to identify the item being required.

In its letter of protest, MPH states:

We must protest the specifications for this solicitation, since they target a single radar product, the Stalker DSR 2X manufactured by Applied Concepts, and exclude of all of the competing radar systems. The bid specifications reflect the recommended, product-specific bid specifications that Applied Concepts publishes on its web site.

The specifications are very restrictive

- They contain 92 individual specifications. The sheer number of specifications is restrictive and specifies the DSR 2X to a "T".
- The minute details of the radar's external characteristics are specified. This goes well beyond describing "a minimum standard of quality only" (Section 2.11 of the Solicitation document).
- Several features of the DSR 2X are specified that are protected by patents held by Applied Concepts. These include specifications 17, 18, 19, 20, 21, 22, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 51, 53, 62, 63, 72, 79, 85, and 86.

- The specifications go so far as to specify the minute details of the inner workings of the radar. The State's concern is really how well the device performs, not how it accomplishes those functions internally. These include specifications 3,5,13, 44, 45, 47, 48, 54, 59, 64, 75, 77, 78, 82, and 85.

The statement (section I of the specification) stating that these specifications are "non-restrictive and do not include any proprietary items ... which would preclude any radar manufacturer from producing radar to meet these specifications" is false. We do not fault the State for this statement; it is copied directly from the Applied Concepts document. However, the statement is not accurate. We insist that the specifications listed in the third bullet above, include features that are covered by one or more of the following Applied Concepts patents:

Patent	Title
7,672,782	Traffic alert police radar
7,411,544	System and method for determining patrol speed
7,409,294	Traffic alert police radar
7,227,494	Vehicular traffic surveillance Doppler radar system
7,218,271	System and method for determining patrol speed
7,068,212	Doppler complex FFT police radar with direction sensing capability
7,057,550	System and method for calibrating a vehicular traffic surveillance
7,038,614	Doppler radar Vehicular traffic surveillance Doppler radar system

The inclusion of these specifications summarily rules out any participation in the solicitation by other radar manufacturers than Applied Concepts. It is true that alternate products are allowed by section 2.11 of the bid. However, no alternate product can meet the solicitation's specifications, as they stand today. We do not feel that our products would be given a favorable assessment since we could not meet these restrictive specifications.

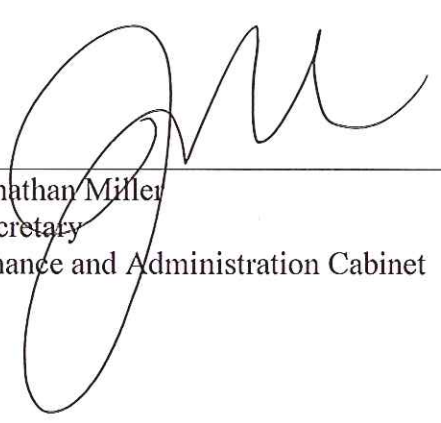
OPS acknowledges that the RFB specification was restrictive to one vendor.

The Secretary finds that the item description in the RFB was written so as to specify a product specific to one manufacturer or vendor. FAP 111-38-00(5). The Secretary also finds that the KSP has not determined that the particular product is essential to the Commonwealth's requirements and other vendors lack the essential features necessary to meet the Commonwealth's need. *Id.* The Secretary, moreover, finds that the inclusion of the "or equal" provision in the RFB does not allow for effective competition. FAP 111-38-00(6). Therefore, the Secretary finds that MPH has satisfied its burden pursuant to *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Accordingly, upon review of the record, MPH has demonstrated that the terms of the Solicitation restrict competition. The protest, therefore, must be **SUSTAINED**. OPS is directed to cancel the RFB and to issue a revised RFB which will allow for effective competition or to implement some other action consistent with this Determination. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.



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Jonathan Miller  
Secretary  
Finance and Administration Cabinet

cc: Richard Mize, OPS